

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
for
MONTGOMERY COUNTY

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CASE NO. CU 17-06

APPLICATION OF BURTONSVILLE TOWNE CENTER LLC

ORDER DETERMINING APPLICABLE
ZONING AND DEVELOPMENT STANDARDS

The subject application seeks a conditional use to allow a drive-thru restaurant, under Section 59-3.5.14.E of the Montgomery County Zoning Ordinance, for property located at 15600 Old Columbia Pike, Burtonsville, MD 20866. The property is further described as Parcel B, Burtonsville Shopping Center subdivision, consisting of a portion of 26.25 acres in the CRT (Commercial/Residential/Town) 1.5 C-1.0 R-1.25 H-70 Zone. The application proposes construction of a Starbucks restaurant on a pad site within the shopping center.

On November 2, 2016, the Applicant filed a “Motion to Determine Applicable Zoning and Development Standards” (Motion) with the Office of Zoning and Administrative Hearings (OZAH). The Motion requested one of two alternative rulings from OZAH in advance of the public hearing. It requested that the application be reviewed under the development standards of the C-2 Zone, which was in effect when a preliminary plan of subdivision was approved for the shopping center in 2006, and the current conditional use standards for a drive-thru restaurant under the 2014 Zoning Ordinance. Alternatively, the Applicant requested that the application be reviewed under the both the C-2 development standards and the special exception standards of the 2004 Zoning Ordinance. Exhibit 26, p. 2.

The Applicant sought a determination on what development standards will apply to the proposed drive thru restaurant because the site design and building do not meet certain development standards in the 2014 Zoning Ordinance (effective on October 29, 2014). The Applicant lists these as follows:

1. Section 59-4.1.7.B.2.b: This section prohibits locating a drive aisle within the “build-to” area of a lot. The Applicant proposes to locate the drive aisle within the build-to area.
2. Section 59-4.5.3.C.3: This section requires that (1) 70% of the building façade be located within the build-to area of the property, and (2) that the building be no more than 20 feet from the right-of-way. The proposed drive-thru restaurant does not meet these requirements.

3. Section 59-4.5.3.C.3: This Section requires that surface parking be located behind the front building line of the drive-thru restaurant.

Factual Background

The Motion includes the following relevant facts, which have been supplemented by the Hearing Examiner:

1. On March 21, 2006, the Planning Board approved a preliminary plan for development of the property under the C-2 Zone. At the time, approximately 11 acres of the site was zoned RC (Rural Cluster) because of its location within the Patuxent River Primary Management Area (PMA). The preliminary plan approval permitted 250,000 square feet of retail and 10,000 square feet of commercial office.
2. On July 2, 2009, DPS approved a Storm Drain and Paving Plan for the entire site.
3. At some point in 2010, the applicant constructed the pad site. Construction included installation of curbs, sidewalks, handicapped ramps, utilities, storm drains, stormwater recharge area, driveways (including the drive-thru lane), parking areas, parking lights, fire lanes, nearby retaining walls and landscaping (outside the curb line). The perimeter buildings of the shopping center faced inward “in accord with Park Planning staff’s pedestrian friendly concept.” Exhibit 33, p. 2. Modifications to the pad site were made in 2014 to accommodate truck movements for the adjacent Green Turtle pad site. *Id.*
4. In 2013, the subject property was rezoned from the C-2 Zone to the CRT Zone under the 2004 Zoning Ordinance. According to the Applicant, the small portion of the property zoned RC was also rezoned to the CRT Zone. The Applicant states that this was to ensure that the future development could be built under the development standards of the C-2 Zone. The Applicant argues that the development standards of the C-2 Zone applied to future buildings because the CRT Zone (at the time) grandfathered C-2 development. The 2004 Zoning Ordinance stated (in Section 59-C-15.9(d)):

A project which has had a preliminary or site plan approved before the application of the CRT, CRN, or CR zone to the property may be built or altered at any time, subject to either the full provisions of the previous zone or this Division, at the option of the owner. If built under the previous approval, it will then be treated as a conforming building, structure, or use and may be renovated, continued, repaired, or reconstructed under Subsection (a) above. If built with an incremental increase over the previous approval, only that incremental increase must comply with this Division.

5. On March 4, 2014, the Council adopted a new Zoning Ordinance, effective on October 30, 2014. *Montgomery County Ordinance, 17-43, Zoning Text Amendment 13-04.* The CRT

Zone did not repeat the grandfathering language from the prior Zoning Ordinance that explicitly permitted the development under the standards of the C-2 Zone.

6. On July 8, 2014, DPS approved a building permit for the Greene Turtle Restaurant under the C-2 development standards of the 2004 Zoning Ordinance.
7. Of the 260,000 square feet of development that was approved by the 2006 preliminary plan, 119,532 square feet has been constructed. Exhibit 37.

Aerial photographs submitted by the Applicant show the subject pad site in 2012, 2014, and 2016 (Exhibit 37):



Google Earth Image
October 12, 2012



Google Earth Image
Dated October 7, 2014



Google Earth Image
2016

Analysis

The Applicant argues that the C-2 development standards apply to the building (although not necessarily the use) for several reasons. It argues that (1) the Applicant has spent considerable amounts of time and money developing the property under the C-2 standards, (2) that the grandfather provision of the 2004 Zoning Ordinance still applies to development of the property, (3) that DPS determined that the C-2 development *and special exception* standards apply to the property, (4) that development of the Green Turtle pad site under the C-2 development standards serves as precedent for this use, (4) that the Applicant was reassured by Planning Staff in 2013 that future development would be grandfathered under the C-2 Zone, and (5) that the application is grandfathered under §59-7.7.1.B of the Zoning Ordinance. Exhibit 28.

DPS and Planning Staff disagree on what standards should be applied to the use. Planning Staff determined that the development standards of the C-2 Zone apply to physical improvements to the site and the use standards of the 2014 Zoning Ordinance apply to the proposed use. Exhibit 39(a). DPS concluded that the use should be reviewed completely under the 2004 Zoning Ordinance (i.e., both the physical improvements and the special exception standards applicable to the use.) Exhibit 41.

Planning Staff bases its conclusion on §§59-7.7.1.A.1 and B.1 of the 2014 Zoning Ordinance. §59-7.7.1.A.1 grandfathers “existing site design,” which is defined as, “[T]he external elements between and around structures that give shape to patterns of activity, circulation, and form. Site design includes landforms, driveways, parking areas, roads, sidewalks, trails, paths, plantings, walls or fences, water features, recreation areas and facilities, lighting, public art, or other external elements.” *2014 Zoning Ordinance*, §59-1.4.2. Section 59-7.7.1.B.1 grandfathers existing approvals and any further “required” steps necessary to develop the property:

Any development plan, schematic development plan, diagrammatic plan, concept plan, project plan, sketch plan, preliminary plan, record plat, site plan, special exception, variance, or building permit filed or approved before October 30, 2014 must be reviewed under the standards and procedures of the property's zoning on October 29, 2014, unless an applicant elects to be reviewed under the property's current zoning. Any complete Local Map Amendment application submitted to the Hearing Examiner by May 1, 2014 must be reviewed under the standards and procedures of the property's zoning on October 29, 2014...The approval of any of these applications or amendments to these applications under Section 7.7.1.B.1 will allow the applicant to proceed *through any other required application or step in the process within the time allowed by law or plan approval*, under the standards and procedures of the Zoning Ordinance in effect on October 29, 2014. The gross tract area of an application allowed under Section 7.7.1.B.1 may not be increased.

Planning Staff reasoned that the physical improvements to the pad site constitute "site design" grandfathered under §59-7.7.1.A.1. While these were grandfathered, Staff determined that the building itself is not grandfathered under that section because it does not exist. However, Staff stated:

Read together with Section 7.7.1.A.2.a, which expressly prohibits the expansion of a nonconforming use, we do not read Section 7.7.1.B.1 to grandfather a new conditional use. But under Section 59-7.7.1.B.2.b, "[a]ny allowed use...may be located in a building or structure deemed conforming under section 59-7.7.1.A.1. Thus a new conditional use can be located in a grandfathered structure.

Exhibit 39. Staff apparently presumes that, because a building could have been built at this location (even though it wasn't) under the preliminary plan approval, a building housing a new conditional use may also utilize the standards of the old zoning. *Id.*

DPS found that both the development standards and the special exception (now conditional use) standards of the 2004 Zoning Ordinance applied to the development. They consider that the conditional use is a "required application or stop in the process" necessary to implement the preliminary plan approval. Exhibit 41.

The Hearing Examiner finds that the development standards of the C-2 Zone should be applied to the building, but the conditional use standards of the 2014 Zoning Ordinance should be applied to the proposed use, although not entirely for the same reasons stated by Planning Staff.

The drive-thru lane is clearly grandfathered under §59-7.7.1.A.1 because (1) the aerial photographs demonstrate that it existed prior to the effective date of the 2014 Zoning Ordinance, and (2) it falls within the definition of “site design” that is grandfathered under §59-7.7.1.A.1 of the current Zoning Ordinance.

The more difficult question is whether the building, which admittedly is not built, may be developed under the standards of the former Zoning Ordinance. This case is unusual because it involves a pad site. The physical improvements grandfathered as “site design” include curbs, parking spaces, drive aisles, utilities and storm drainage. The pad site as constructed (including the location of the drive aisle) necessarily constrains the placement of the building on the subject site so that it cannot comply with the requirements of the current Zoning Ordinance. Thus, in order to recognize the Applicant’s rights to the “grandfathered” portions of the site design, the placement of the building must, *a fortiori*, deviate from the “placement” standards of the current Zoning Ordinance.

The Hearing Examiner holds that, in this circumstance, the placement of the building may conform to the development standards of the prior zoning to the extent necessary to accommodate the grandfathered site design. The site design was constructed under the development standards of the C-2 Zone. Because the site design dictates the location of the building, the building may be completed under the standards of the C-2 Zone as well.

The Hearing Examiner further determines, however, that the conditional use standards of the current Zoning Ordinance apply to the proposed use. Section 59-7.7.1.B.1 grandfathers

existing *approvals* under the 2004 Zoning Ordinance and permits the developer to obtain all further approvals necessary to implement the approvals existing as of October 30, 2014. In this case, the “approval” grandfathered under the Zoning Ordinance is the 2006 preliminary plan. A conditional use, however, is not an approval “required” to implement the preliminary plan.

The purpose of the grandfathering clause was to permit completion of projects that were caught in “mid-stream” by the changes to the new Zoning Ordinance. Mid-stream meant projects that were working toward an approval or projects that had received one approval, but needed others before they could be completed. By allowing owners to finish out with “required approvals,” the Council intended to permit those projects already in the development process to be implemented under the standards of the old Zoning Ordinance. The grandfathering was intended, however, to apply to particular approvals or plans that were pending or approved. Staff explained the intent:

- 1) Allow every approved and pending plan submitted X months after the ordinance is approved (development plan, concept plan, project plan, sketch plan, preliminary plan, site plan, special exception and building permit) to complete that approved plan without regard to the requirements of the new zone;

PHED Committee Packet, September 13, 2013 Worksession, pp. 14-15.

Preliminary plans and special exceptions are listed as two separate approvals in Staff’s memorandum to the PHED Committee and there are distinctions between the two. A preliminary plan does not approve specific uses, particularly conditional uses, or even the layout of buildings. In this case, the 2006 preliminary plan approval states, “[T]he layout of the buildings on the property is conceptual and is shown as a number of building pads within the parking lots to provide flexibility for future tenants.” Exhibit 33(a), p. 2. In a preliminary plan, the *uses* are generally described for the purpose of determining the adequacy of public facilities (i.e., whether roads, schools, and utilities are sufficient to serve the use), but are not specified. In this case, the uses

proposed in the preliminary plan are described only as 250,000 square feet of retail and 10,000 square feet of office uses. *Id.* at 5.

A conditional use, however, is not permitted by right in a zone and is not vested by the preliminary plan approval. A conditional use requires approval of a specific plan showing the layout and operation of the particular use sought. The court in *Peoples Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 71-72 (2008), described the difference between a conditional use (or special exception) and a permitted use as follows:

The special exception adds flexibility to a comprehensive legislative zoning scheme by serving as a “middle ground” between permitted uses and prohibited uses in a particular zone. Permitted and prohibited uses serve as binary, polar opposites in a zoning scheme. A permitted use in a given zone is permitted as of right within the zone, without regard to any potential or actual adverse effect that the use will have on neighboring properties. A special exception, by contrast, is merely deemed *prima facie* compatible in a given zone. The special exception requires a case-by-case evaluation by an administrative zoning body or officer according to legislatively-defined standards. That case-by-case evaluation is what enables special exception uses to achieve some flexibility in an otherwise semi-rigid comprehensive legislative zoning scheme.

Because approval of the 2006 preliminary plan did not include approval of this conditional use nor is the conditional use required to implement the approved preliminary plan, the Hearing Examiner finds that the conditional use is *not* grandfathered under Section 59-7.7.1.B.1 of the Zoning Ordinance and must comply with the use standards in §59-3.5.14 of the 2014 Zoning Ordinance.

The Hearing Examiner does not find the balance of the Applicant’s arguments for reaching the same conclusion compelling. DPS issued the permit for the Green Turtle pad site *before* the effective date of the new Zoning Ordinance and there is nothing in the record to indicate that it required a conditional use approval.

The Applicant does assert that it made significant financial investment in developing the property under the old C-2 Zone. This suggests a constitutional argument that the Applicant has

acquired “vested rights” to finish development of the entire center under the C-2 development standards. Because the Applicant did not specifically make this argument, however, the Hearing Examiner does not reach the issue in this case.

Order

Upon review of the Applicant’s Motion to Determine Development Standards, and all responses thereto, it is hereby

ORDERED, that the development standards of the former C-2 Zone (§59-C-4.35 of the 2004 Zoning Ordinance) should be applied to physical improvements to the subject property, and it is further

ORDERED, that the use standards of §59-3.5.14.E of the 2014 Zoning Ordinance shall apply to the proposed use.

Issued this 28th day of December, 2016.



Lynn A. Robeson
Hearing Examiner

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Abutting and Confronting Property Owners
(or a condominium’s council of unit owners or renters, if applicable)
Civic, Renters’ and Homeowners’ Associations within a half mile of the site
Any Municipality within a half mile of the site